PANCHAVARNAM MADASAMY *a*

v.

VELOO M. SUPPIAH & ANOR.

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[ORIGINATING SUMMONS NO. 24-113 OF 1991] *b*
21 MARCH 1991

FAMILY LAW: *Custody - Child resident outside jurisdiction - Divorce proceedings commenced by other party - Whether duplicity of proceedings - Federal Constitution, Article 121 - Courts of Judicature Act 1964, s. 23(1) - Guardianship of Infants Act 1961 - Law Reform (Marriage and Divorce) Act 1976.* *c*

The plaintiff in this case is the wife of the 1st defendant, D1 and the 2nd defendant D2 is the brother of D1. The plaintiff and D1 had a child while they were both in England. Both the husband and wife were permanent residents of England. The marriage deteriorated and D1 sent the child to the care of D2 in Malaysia. The plaintiff wife applied for custody of the child and the husband sought a dismissal of the custody application. *d*

The two issues were:

(1) whether the present application should be struck out as D1 had already filed a divorce petition in the Kuala Lumpur High Court, because it constitutes a duplicity of proceedings.

(2) whether this Court had jurisdiction as both the father and child were and are resident in an area which is outside the jurisdiction of the Court. *e*

Held:

[1] Under the Law Reform (Marriage and Divorce) Act 1976, the mere existence of a pending divorce suit and a possibility of custody being raised as an ancillary power does not preclude a mother from resorting to the Guardianship of Infants Act 1961 for an expedient remedy in an appropriate case. *f*

[2] Article 121 of the Federal Constitution must be read in conjunction with Article 121(A)(3) and in particular s. 23 of the Courts of Judicature Act 1964, which in effect give any High Court in Malaya an absolute jurisdiction to try any suit which originates from any place in the state of Malaya where both parties consent; if they do not, certain guidelines have been laid down in the federal law for designating their jurisdiction. *g*

[3] The cause of action, that is, the kidnapping of the child out of his mother's custody arose in London. Therefore it was beyond the jurisdiction of our Courts in light of Article 121. However when the child was taken and placed with D2, the matter came within the jurisdiction of our Malaysian Courts by virtue of s. 23(1)(b) of the Courts of Judicature Act 1964. Taking into account the resident of D2, the proper Court is the High Court of the Federal Territory. *h*

[4] The fact that the application had been filed in an area outside those demarcated by s. 23 of the Courts of Judicature Act 1964 will not entitle the defendant to get the case struck out; however he can move the Court to have it transferred to the Court within the area of its local jurisdiction.

[Order accordingly.] *i*

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)(b)
Federal Constitution, art. 121(A)(3)

For the plaintiff - P.S. Ranjan, Ashok Puri (Manmohan S. Dhillon with him); M/s. P.S. Ranjan & Co.

For the defendants - Sa Ponmugam; M/s. Ponmugam & Co.

JUDGMENT

Wan Yahya J:

In this hearing I am only concerned with an application in encl. 4 by a husband (defendant/applicant in this case) to dismiss the earlier application made by his wife in encl. 1 for the custody of their only infant son.

The relevant facts in so far as I could gather from the affidavits are as follows:

The plaintiff is the wife of the 1st defendant and the 2nd defendant is her brother-in-law.

The plaintiff and 1st defendant had gone to Britain in 1979. In 1980 their child, Sumita, whose custody is being contested now, was born. The wife took on a job and the husband also took part-time job whilst studying engineering in a technical college in London and finally completed his studies sometime in 1987. In 1986 they bought a house in Southall London in their joint names. A balance sum of £34,000 is still outstanding. Both husband and wife enjoyed a permanent resident's status in United Kingdom.

Subsequently unhappy differences arose between the parties. They continued to live under one roof but slept in separate bedrooms and at the same time both went for marriage counselling.

In November 1990 there was a fresh outbreak of hostility between the parties when the husband accused his wife of committing adultery. On 10 December 1990 when the wife returned from her work at 3.30 p.m. she found their child as well as his passport and other documents missing. Apparently the husband had sent the child to Malaysia by air and subsequently took another flight for the same destination. The child had since been placed under the care of Manohar, the 2nd defendant who is residing at Taman Lucky Puchong, Kuala Lumpur.

The 1st defendant later enrolled the child in a school and then filed an action for divorce at the Kuala Lumpur High Court.

I have in the above narrative only dealt with the common facts without going into the gravamen of the inculpatory remarks made by each party and in particular I have ignored the affidavit of Manohar, the brother-in-law whose damning denunciation of the plaintiff's fitness as a mother, founded purely on hearsay evidence of an innocent child, is deplorable.

Having set aside these matters which are not relevant towards the consideration of the present issue, I will deal strictly with the issues relevant to the application in encl. (1).

Two issues were raised by the husband. In his affidavit in support he states that because he had already filed a divorce petition in the Kuala Lumpur High Court, the present application for custody should be struck out because it constitutes a duplicity of proceedings. I am unable to agree with his submission on this point. Under the Law Reform Marriage & Divorce Act 1976 the mere existence of a pending divorce suit and a possibility of custody being

raised as an ancillary prayer, does not in my mind preclude a mother from resorting to the Guardianship of Infant Act 1961 for an expedient remedy in an appropriate case. To hold so would mean that a mother against whom divorce proceedings had been filed who is not ordinarily resident in the place in which the suit originated could not file an action under the Guardianship of Infant Act 1961 for the immediate custody of her infant child in another Court even if she should suddenly find that her child had been taken to a place outside the local jurisdiction of the divorce Court. That brings me to the next issue.

In the course of his argument before me, Mr. Ponmugam raised another point which I think merits further consideration. Counsel said that both the father and the child were and are resident in an area which is outside the jurisdiction of this Court.

Mr. Rajan citing Article 121 of the Constitution argues that the Court has the jurisdiction to hear the suit. Mr. Ponmugam, however did not elaborate on the matter. I fully agree with Mr. Rajan that for the purpose of Article 121, there are only two categories of High Court, one in Malaya (West Malaysia) and the other one in Borneo (East Malaysia) and that generally speaking each High Court can deal with matters arising within its jurisdiction, that is, State of Malaya & Borneo. But then Article 121 must read in conjunction with Article 121(A)(3) and in particular s. 23 of the Courts of Judicature Act 1964 which says:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership or which is disputed or situated,
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> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
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> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdition as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

The effect these two provisions is to give any High Court in Malaya an absolute jurisdiction to try any suit which originates from any place in the State of Malaya where both parties consent, but when they do not, certain guidelines for designating their respective jurisdictions had been laid out in the above Federal Law.

In the present case the cause of action, that is, the actual 'kidnapping' of the child out of his mother's custody, appears to have arisen in London where the parties were then domiciled and as this had taken place clearly out of the jurisdiction of our Courts, the provisions of s. 23(a) and (c) do not apply. However, when the child was taken and placed in the care of his uncle, the 2nd defendant, the matter came within the jurisdiction of our Malaysian Court by virtue of s. 23(1)(b) of the Courts of Judicature Act 1964 and as the 2nd defendant is resident in Taman Lucky Puchong, the proper Court having civil jurisdiction over that area is the High Court of the Federal Territory.

The fact that the application has been filed in an area outside those demarcated by s. 23 will not entitle the defendant to get the case struck out but he can of course move the Court to have it transferred to the Court within the area of its local jurisdiction.

The purpose of s. 23 is to provide some protection to the defendant so that he may not be unfairly dragged into a Court which is outside the area of his residence or the place where the dispute had originated.

In view of the above findings, I am making an order for this application to be transferred to the Federal Territory High Court in Kuala Lumpur with immediate effect and in view of the urgent nature of the order sought for, the applicant may request for an early trial at the Kuala Lumpur Court forthwith.

Also found at [1991] 3 CLJ 2180